United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2126

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOAN HULL, on behalf of herself and others similarly situated,

Plaintiff-Appellant,

- against -

CELANESE CORPORATION, CELANESE FIBERS MARKETING CO.; JOHN W. BROOKS, VERNON E. JORDAN, GRAYSON M.-P. MURPHY and DR. JEROME B. WIESNER, Officers and Directors of CELANESE CORPORATION; and ALLAN R. DRAGONE, President of CELANESE FIBERS MARKETING CO.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, New York 10017
(212) OX 7-8640
Attorneys for Plaintiff-Appellant

Of Counsel:

Leonard B. Boudin
K. Randlett Walster
Eric M. Lieberman

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Defendants attempt to obfuscate the central issues in this case by a lengthy argumentative recital of facts not relevant to the questions presented on this appeal and by emphasis upon legal questions not necessary to its result.

Upon reading defendants' brief, one would think

that this appeal concerns Delulio's right to intervene in the Hull case, Delulio's right to sue Celanese and even the merits of Delulio's cause of action against Celanese.[1/] Thus, defendants claim that "The keystone of appellant's argument is the propriety of Delulio's conduct" (Def. Br. at 21).[2/] In fact, the question of the propriety vel non of Delulio's conduct is not directly in issue here at all. Even if Delulio acted improperly, that would not of itself justify disqualification of Hull's counsel. The only question before the court is whether plaintiff's attorneys, the

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1/ Delulio has instituted her own action in the district court, Delulio v. Celanese Corp., No. 74-5249 (S.D.N.Y.). And defendants have raised as defenses in that action many of the same issues they attempt to raise on this appeal. It thus would seem that defendants are seeking a premature advisory opinion from this court concerning the merits of their defense to the Delulio case. On the appropriate occasion, the district court and perhaps this court will have time enough to consider the questions raised by the parties in that action.

2/ "Br." refers to plaintiff's brief; "Def. Br." refers to defendants' brief; references to "infra" or "supra" are to pages in this Reply Brief.

Rabinowitz firm, violated the American Bar Association Code of Professional Responsibility in a manner requiring disqualification of the firm from further representation of Hull in this case. The only fact - and the dispositive one - concerning Delulio's actions relevant to that question is that Delulio did not reveal "secrets" or "confidences" to the Rabinowitz firm while represented by them (Br. at 24-28).[3/]

Accordingly, much of the material contained in defendants' brief is, at best, of tangential relevance to the outcome of this appeal. We shall refer to those parts of that brief only where necessary to set the issues in proper context and perspective.

3/ We have argued in Point III of our principal brief that because Delulio was entitled to intervene in the Hull case and seek representation from the Rabinowitz firm, she should not have been excluded from the Hull action and, a fortiori, the Rabinowitz firm should not have been disqualified from representing Hull. The converse, however, does not follow. Even if Delulio's actions were improper, the Rabinowitz firm arguably could be disqualified only if Delulio actually transmitted confidential information to it.

POINT I

DEFENDANTS' THEORY THAT THE RABINOWITZ FIRM MAY BE DISQUALIFIED BECAUSE OF THE MERE RISK THAT DELULIO TRANSMITTED TO IT CONFIDENTIAL INFORMATION ACQUIRED BY HER IN HER PRIOR REPRESENTATION OF DEFENDANTS IS ERRONEOUS AS A MATTER OF LAW.

In plaintiff's brief we showed that disqualification of opposing counsel because of the risk that confidential information might be used against his adversary is limited to the situation where the attorney (or a member of his law firm) had previously represented the adverse party on a substantially related matter (Br. at 17). See, e.g., Emle Industries, Inc v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); T. C. Theatre Corp. v. Warner Bros. Pictures, 113 F.Supp. 265 (S.D.N.Y. 1953). Disqualification in such a situation is imposed because the attorney is conclusively presumed to possess confidential information from his former client and there is a risk that he might consciously or unconsciously use it to that client's disadvantage.

Where, however, a motion is made to disqualify an opposing attorney, although neither he nor any member of his law firm ever represented the moving party, the threshold issue is whether the attorney ever improperly received

confidences in the first place. And, there is a presumption of propriety or regularity that receipt did not take place T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., supra.

Defendants seek to blur the clear-cut distinctions made in the cases. They claim that an attorney should be disqualified where there is a mere "risk" or possibility that he received confidences from the former lawyer of an adverse party. And they claim that such a risk exists whenever there is "close contact" with the former attorney (Def. Br. at 33-34).[4/]

In support of this rather startling new view of the law, defendants cite only one case -- Doe v. A. Corp., 330 F.Supp. 1352 (S.D.N.Y. 1971), aff'd per curiam sub nom. Hall v. A. Corp., 435 F.2d 1375 (2d Cir. 1972). Defendants reliance is misplaced. In Doe the co-counsel of the lawyer who "switched sides" was disqualified, but precisely because he had actually received substantial and material disclosures of confidences from the lawyer who formerly had been employed by the defendant corporation. Indeed, the "confidences" gathered in the former representation were the sole basis for the lawsuit. Without them, the complaint could not have

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4/ That the mere "risk of improper acquisition of confidences" forms no basis for disqualification is at the heart of this court's decision in Meyerhoffer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974)(emphasis added).

been filed.

Without conceding the above point, defendants seek to overcome its import by arguing that: (1) Delulio's cause of action was of necessity based upon confidential information gathered from Celanese which she must have transmitted to the Rabinowitz firm (Def. Br. at 38-46); and (2) that Delulio's alleged possession of confidences should be imputed to the Rabinowitz firm as a matter of law because of the attorney-client relationship between them (Def. Br. at 35-38). We treat of the latter argument first.

Defendants argue that confidences in Delulio's possession should be imputed to the Rabinowitz firm as a matter of law in the same manner that the confidences of a client in the possession of one attorney are imputed to all his partners and associates (Def. Br. at 34-35). See, e.g., Laskey Bros. of West Virginia v. Warner Bros. Pictures, Inc., 224 F.2d 824 (2d Cir. 1955) cert. den. 350 U.S. 932; W. E. Bassett Co. v. H. C. Cooke Co., 201 F.Supp. 821 (S.D.N.Y. 1961) aff'd per curiam, 302 F.2d 268 (2d Cir. 1962).[5/]

5/ However, even this standard rule of imputation is not rigidly applied and in numerous instances, the challenged attorney has been permitted to rebut his possession of confidences. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Inc ., 370 F.Supp. 581 (E.D.N.Y. 1973) app. pending (2d Cir. Dkt. Nos. 74-1104, 74-1095); United States v. Standard Oil Co., 136 F.Supp. 345 (S.D.N.Y. 1955); Laskey Bros. of W. Va., Inc. v. Warners Bros., supra.

Defendants argue that since both relationships involve close contact and an opportunity and motive for disclosure of confidences, they should both be treated similarly. (Def. Br. at 37-38).

The simple answer to defendants' argument is that close contact and opportunity and motive for disclosure are not the basis for the automatic disqualification of the members of a law firm. Thus where an attorney is disqualified from litigating against a former client, co-counsel with whom he was associated in his new representation is not disqualified.[6/] See, American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); Hawk Industries Inc. v. Bausch & Lomb, Inc., 59 F.R.D. 619 (S.D.N.Y. 1973); T. C. Theatre Corp. v. Warner Bros. Pictures, supra; W. E. Bassett Co. v. H. C. Cook Co., supra; Cf. Allied Realty of St. Paul, Inc. v. Exch. Nat. Bank of Chicago, 408 F.2d 1099 (8th Cir. 1969), cert. den. 396 U.S. 823. Rather, the co-counsel is disqualified only where actual improper disclosures are made to him. Doe v. A. Corp., supra.

6/ Indeed, attorneys disqualified from litigating against a former client are permitted to continue to represent the new client in the same action against other defendants. Fisher Studio, Inc. v. Loew's Inc., 232 F.2d 199 (2d Cir. 1956) cert. den. 352 U.S. 836.

Automatic imputation of confidences to co-counsel is rejected, despite their close connection and the fact that the motive and opportunity for disclosure between co-counsel is often, as a practical matter, much greater than the motive and opportunity for disclosure within a law firm. Indeed, in most law firms, it is a virtual certainty that many partners and associates would have no idea whatsoever of the issues of a particular office case, let alone of "confidences" which may have been disclosed to a particular attorney in the firm.

The imputation of confidences to members of a law firm is a legal fiction designed to assure an attorney's loyalty to a former client by limiting his ability to build his practice as the result of information acquired in the course of a prior representation. Where a law firm's value to a new client is in part a reflection of one of its member's possession of confidences from a former representation, possession of the former client's confidences is imputed to all members of the firm.

Imputation is thus not based on the possibility of access to confidential information, but upon the desire to preclude an attorney from turning a former representation to a business advantage. Consequently in the co-counsel cases,

there is no reason for imputing possession of confidences to an unrelated attorney. In the absence of proof either that the co-counsel is sharing fees with the attorney who must be disqualified, or that the co-counsel actually received "secrets" from him, the disqualification does not extend to him. Cf. Allied Realty of St. Paul, Inc. v. Exch. Nat. Bank of Chicago, supra, 408 F.2d at 1102.

Indeed, defendants' theory that it must be presumed that Delulio disclosed secrets to the Rabinowitz firm because she was their client was raised and rejected in the T. C. Theatre case. There, Cooke (with co-counsel Kahan) represented the plaintiff in an action which was found to be substantially related to a matter in which Cooke had acted as counsel for the defendant. Kahan also represented Cooke in an action against the same defendant for fees owed to Cooke from his prior representation of the defendant on the substantially related matter. The court disqualified Cooke, but refused to disqualify Kahan in either action. It specifically rejected the argument that Cooke must be presumed to have disclosed secrets to Kahan because Kahan was Cooke's attorney.

> "Cooke's right to recovery of additional fees, if any, does not depend upon the disclosure of confidential communications, but, rather, upon the nature, extent, and importance of the services performed by him. He could enumerate the various conferences with his client without detailing the matters which might have been discussed. It seems to me that Kahan's representation of Cooke could be just as effective without disclosure."
> 113 F.Supp. at 272.

Defendants seek to distinguish the T. C. Theatre case on the grounds that Delulio would have a greater motive than Cooke had to disclose secrets and confidences. (Def. Br. at 48-49) The distinction is not persuasive. Like Cooke, Delulio's right to recover additional salary and fringe benefits[7/] does not depend upon the disclosure of confidential communications.[8/] As we show, infra, Delulio's

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7/ Delulio, of course, was employed house counsel, not retained outside counsel. Her claims that she was treated unfairly in the terms and conditions of her employment is analogous to a suit for fees due brought by a retained outside counsel.

8/ Nor does the fact that Delulio might have recovered money damages if she won her claim strengthen defendants' argument as to the likelihood of Delulio's disclosure. (Def. Br. at 38) Of course she had a financial interest in redressing the economic injury caused by her employer. Redress would be accomplished by proving the facts of her own case and there is no reason to believe she attempted to do any more than that. T. C. Theatre Corp. v. Warner Brothers Pictures, Inc., supra, 113 F.Supp. at 271-272.

cause of action turns exclusively on facts gathered from her own experiences and observations as an employee at the company. As with Kahan's representation of Cooke, the Rabinowitz firm's representation of Delulio would have been "just as effective without disclosure." Indeed, examination of Delulio's proposed complaint and her affidavit in support of the application to intervene reveal that each of the discriminatory acts alleged by Delulio had nothing whatever to do with any possible confidences with which Delulio might have been entrusted regarding Hull or any other case.

This brings us to defendants' second argument, namely, that Delulio's cause of action was, of necessity, based upon confidential information gathered from Celanese which she must necessarily have transmitted to the Rabinowitz firm (Def. Br. at 38-46). As we have suggested, this argument has no relation to reality.

Even a cursory reading of Delulio's complaint and affidavit reveals that they are merely statements of Delulio's own experience on the basis of which she concluded that she was a victim of sex discrimination. Delulio's affidavit details her personal history of discriminatory treatment at

Celanese, including her difficulties in getting a firm offer from Celanese (91a-92a); Celanese's refusal to assign her to the work promised her (92a-93a); Celanese salary discrimination (93a-94a); her exclusion from legal seminars (95a); the unprofessional treatment generally accorded to her (95a); and the harassment since filing her charge of discrimination with EEOC (96a). Obviously, these facts were directly experienced by Delulio, not learned from research into company files. The fact that Hull and the proposed intervenors allege that defendants have engaged in a "pattern and practice" of sex discrimination does not show that they share secret or confidential information. This allegation merely reflects what must be the case in any sex discrimination action: the complainants point to a variety of specific incidents which, when taken together, demonstrate defendants' proclivity to treat its female employees unfairly.

Defendants point to Delulio's alleged disclosure of a confidence regarding Marilyn Karnes (Def. Br. at 43) to bolster their argument that she must have made other revelations. The incident described proves nothing of the kind. Defendants, in opposing Delulio's request for intervention, had charged that she possessed substantial confidential

information and asserted that among other activities, she had consulted with Celanese officials to review the entire situation regarding Marilyn Karnes' complaints of sex discrimination. Defendants alleged that Delulio "participated in discussions with [Celanese officials] and others named by Karnes as allegedly discriminating against her and advised [them] with respect to certain of the actions which are now the subject of Karnes' complaint" (142a). In response, Delulio sought to demonstrate the overbreath of this allegation and replied:

> "I did attend one meeting relating to Marilyn Karnes, although I do not recall Sims attending that meeting. It was a very short meeting and I was simply told that the corporation hoped to encourage Ms. Karnes to leave. I had no occasion to discuss the merits of the Karnes case, nor did I review the entire situation, as alleged" (180a).

It is obviously unjustifiable for defendants to use this comment, made in response to their own motion for denial of Delulio's application to intervene on the ground that she possessed confidential information, to show a proclivity for such revelations in the prosecution of her own case.

The sworn denials of receipt of confidences made by all members and associates of the Rabinowitz firm, while not addressed with the same calumny directed

by defendants at Delulio, are dismissed by defendants as essentially incredible. Defendants contend that the Rabinowitz firm cannot deny receipt of confidential information because it does not know the source of the information disclosed by Delulio (Def. Br. at 41-42). However, Delulio's affidavit shows, on its face, that the source of the information disclosed in connection with her motion to intervene was her own personal experience. Nothing in the record shows otherwise.

Contrary to defendants' assertions (Def. Br. at 44-46), they would not be put under any unfair burden if required to demonstrate, as a factual predicate for disqualification, that confidences had in fact been disclosed to the Rabinowitz firm. It is only in the Emle type case, where the disqualified attorney was the former representative of an adverse party that no proof of possession of confidences is required. However, even in such cases, a high degree of factual specificity supporting the need for

disqualification has been required.[9/] The inconvenience which arguably might be caused to defendants by requiring them to come forward with such proof, when compared with the absolute deprivation of Hull's right to be represented by counsel of her choice, makes it clear that defendants should have been required to make a factual showing that the Rabinowitz firm was in fact in possession of Celanese confidences before it could be disqualified.

9/ Depositions were taken of the attorneys' involvement in the prior action in Emle Industries, Inc. v. Patentex, Inc., supra; Uniweld Products, Inc. v. Union Carbide Corp., 385 F.2d 992 (5th Cir. 1967) cert. den. 390 U.S. 921; Fleischer v. A.A.P., Inc., 163 F.Supp. 548 (S.D.N.Y. 1958) app. dismissed sub nom. Fleischer v. Phillips, 264 F.2d 515 (2d Cir. 1959) cert. den. 352 U.S. 1002; Chris Craft v. Independent Stockholders Comm., 354 F.Supp. 895 (D.Del. 1973). See also Consolidated Theatres v. Warner Bros. Circ. Mgmt. Corp., 216 F.2d 920 (2d Cir. 1954), and Fisher Studio v. Loews, Inc., supra, where the disqualification issue was referred to a master; and see Doe v. A. Corp., supra; Meyerhoffer v. Empire Fire & Marine Insurance Co., supra, where the records on disqualification were sealed indicating that some confidential information was set forth in the record.

POINT II

PLAINTIFF'S COUNSEL CANNOT BE DISQUALIFIED ON THE BASIS OF DELULIO'S ALLEGED VIOLATION OF CANON 5.

Defendants expend considerable effort in an attempt to show that Delulio engaged in a variety of activities "disloyal" to her employer and hence in violation of Canon 5 of the Code of Professional Responsibility (Def. Br. at 21-26). Defendants claim that one of Delulio's acts of disloyalty was her attempt to intervene in the Hull case and that the Rabinowitz firm's preparation of formal papers on that motion taints the firm with Delulio's alleged disloyalty and misconduct and requires its disqualification from representation of Hull. Defendants' argument is constructed out of whole cloth and does not provide any justifiable basis for the disqualification order.

A. Delulio Did Not Violate Canon 5.

Defendants argue that Delulio was guilty of "disloyalty" to her employer. While conceding that Delulio had a right to attempt to assert sex discrimination claims against Celanese, defendants urge that she was "disloyal" in "endorsing" Hull's charges that she (Hull) was the victim of defendants' sex discrimination (Def. Br. at 21).

The facts cited to support this charge reveal its emptiness.

First, defendants urge that the very act of seeking to intervene in the Hull case was disloyal (Def. Br. at 22). But inasmuch as Delulio concededly could sue her employer, it is difficult to see why it would be disloyal to intervene in a pending action raising closely related if not congruent issues of law and fact. The mere fact that Delulio applied for intervention does not ipso facto amount to an "endorsement" of the charges made by Hull and other intervenors; rather, it reflects the obvious conclusion that the individual claims made by Hull and the intervenors were legally and factually related and that the resources of the parties and the court would be used most efficiently if their claims of sex discrimination were resolved in one action.[10/]

Second, defendants repeatedly charge that Delulio made sworn statements that Celanese in fact was guilty of unlawful sex discrimination against Hull (Def. Br. at 23).

10/ Indeed, the motion to intervene was in the spirit of Ethical Consideration 9-2 of the Code of Professional Responsibility, which states that a lawyer should act in a manner that promotes public confidence in the efficiency of the legal system.

Defendants engage in a facile semantic game. The fact is that no such statements were made; indeed, defendants make no specific reference to one such statement. Instead they rely upon a sentence in Delululio's affidavit in support of her motion to intervene that "I, like plaintiff Hull, have been subjected to various forms of sex discrimination" (91a). When read in its full context, including the sentence immediately preceding it and the paragraphs that follow, it is clear that the quoted sentence does not have the meaning defendants attribute to it. Rather, Delulio merely stated that she had read the complaint and proposed amended complaint and felt that she properly could intervene because she had personal complaints of discrimination similar in many ways to the allegations made by Hull (90a-91a).[11/] She then set forth the substance of her own complaints, making no further reference to those of Hull until the last

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11/ As a practical matter, the sentence upon which defendants rely was drafted by counsel for the purpose of showing that intervention was proper and that Delulio need not exhaust her administrative remedies. Identical statements, also drafted by counsel for the same purpose, are contained in the affidavits of the other proposed intervenors - Didio, Karnes, Swet, and Kelly (these affidavits are not reproduced in the appendix, but are available to the court in the record on appeal).

paragraph of the affidavit, where she stated that her charge was "basically the same as that complained of by plaintiff Hull" (96a, emphasis added). In no way did Delulio state or intend to state that Hull's charges were, in fact, true.

Finally, defendants refer to articles culled from The New York Times and The Wall Street Journal to show that Delulio publicly endorsed Hull's charges. Apart from the clear unacceptability of the quoted articles as evidence of anything relevant to this case,[12/] they contain no attribution to Delulio of comment on Hull's case. Thus, defendants' allegation that Delulio made public statements that Celanese was "guilty as charged" in the Hull case (Def. Br. at 26) is demonstrably false.

It thus becomes clear that the real "disloyalty" about which defendants are concerned is Delulio's temerity in seeking to redeem through litigation the civil rights arising out of her employment by defendants. This is a right guaranteed to her by Act of Congress and by the Con-

12/ The articles are, of course, unsworn, hearsay, and contain clear examples of journalistic license, such as the statement that "Miss Delulio's consciousness was apparently raised" (Def. Br. at 24).

stitution. The Code of Professional Responsibility itself imposes no limitation on an attorney's attempt to vindicate his or her rights in such a context (Br. at 43-47).

B. Even if Delulio Violated Canon 5, Disqualification of the Rabinowitz Firm Is Improper.

Defendants argue (Def. Brief at 26-29) that the Rabinowitz firm violated Canon 9 by preparing and filing Delulio's application to intervene, her affidavit in support of intervention and the proposed amended complaint. Defendants' argument is vague and unfocused. They concede, as they must, that there is no support in the language of Canon 9 or its Disciplinary Rules for disqualification for such actions. The thrust of their argument is that just because "there is no precise precedent" for their view, that is no reason why Canon 9 should not be applied here.[13/] To the extent that any affirmative argument is made as to why Canon 9 should require disqualification, it is totally conclusory. No cases are cited in its support. The

13/ This argument does not depend upon Delulio's possession or disclosure of confidential information. If accepted, it would permit disqualification here even had Delulio never even been exposed in the slightest way to the Celanese defense of Hull's charges.

only "authority" relied upon is the vague language of Ethical Considerations 9-2 and 9-6. The language of these provisions in no way addresses the problem involved, and adds little in the way of clarity to the vague injunction of Canon 9 itself. This reflects the nature of the "Ethical Considerations" in the Code, which, unlike the "Disciplinary Rules," are "aspirational" rather than "mandatory" in character, and "represent the objectives toward which every member of the profession should strive." Code of Professional Responsibility, Preliminary Statement.

Indeed, defendants' argument proves too much. If, as defendants claim, the basis of disqualification is merely that the Rabinowitz firm "abetted" Delulio's alleged "disloyalty" by filing Delulio's application to intervene, her affidavit and the amended complaint, why was not any resulting appearance of impropriety dispelled by Delulio's exclusion from the Hull case and the Rabinowitz firm's severance of relations with Delulio? Under defendants' theory, any lawyer retained by Delulio who filed similar papers also would be subject to disqualification from further representation of Delulio and other interests adverse to Celanese. That is a high price indeed to place

upon the exercise of the services of an attorney. If defendants' argument is accepted, all attorneys will be put on notice[14] that whenever they represent client-attorneys in actions against former employers, the mere act of representation can result in disciplinary sactions pursuant to Canon 9.

Ultimately, defendants' argument seems to rest on their assertion that "in close cases, doubt is to be resolved in favor of disqualification" (Def. Br. at 20, citing Fleischer v. A.A.P., 163 F.Supp. 548, 552-553 (S.D. N.Y. 1958))[15]. But the Fleischer case applied its "reso-

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14/ I.e., clients who happen to be attorneys.

15/ Defendants assert that review of the district court decision is limited to ascertaining only whether the disqualification order constitutes an abuse of discretion (Def. Br. at 18). In contrast, this court, in reversing the two most recent disqualification decisions before it, has engaged in a painstaking review of the legal and factual basis of the orders from which an appeal was taken. See Meyerhoffer v. Empire Fire & Marine Insurance Co., 497 F.2d 1190 (2d Cir. 1974); City of New York v. General Motors Corp., 501 F.2d 639 (2d Cir. 1975). Thus, in contrast to the grudging analysis proposed by defendants, this court has engaged in precisely that thorough analysis required to achieve the delicate balance between an individual's right to counsel and the need to maintain the highest ethical standards. Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 564-5 (2d Cir. 1973). For as one lower court in this circuit has cautioned, the general public as well as private litigants would be ill

Fn. cont., p. 23

lution of doubt" rule in the context of a conflict-of-interest situation; the question upon which "doubt" was to be resolved was merely "whether particular confidences of the former client will be pertinent to the instant case." 163 F.Supp. at 553, quoting United States v. Standard Oil Co., 136 F.Supp. 345, 364 (S.D.N.Y. 1955). There was no suggestion in Fleischer or any other case that whenever there is "doubt" as to whether the disqualification doctrine should be extended to a new situation upon a new theory and without precedent, the "doubt" should be resolved in favor of disqualification. Indeed, the rule is precisely to the contrary. As Judge Kaufman noted in the Standard Oil case itself:

> "When dealing with ethical principles, it is apparent that we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking

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Fn. 15 cont. from p. 22
served "if we were to allow unfounded charges of impropriety to form the sole basis for an unjust disqualification." Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F.Supp. 581, 589 (E.D.N.Y. 1973), App. pending (2d Cir. Dkt. Nos. 74-1104, 74-1095).

> analysis of the facts and precise application of precedent...
>
> ...
>
> ...'[S]ome of the greatest errors in thinking have arisen from the mechanical, unreflective, application of old formulations --forgetful of a tacit "as if"--to new situations which are sufficiently discrepant from the old so that the emphasis on the likenesses is misleading and the neglect of the differences leads to unfortunate or foolish consequences.' United Shipyards v. Hoey, 2d Cir. 1942, 131 F.2d 525, 526-27." United States v. Standard Oil, supra, 136 F.Supp. at 367.

See also Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra; Consolidated Theatres v. Warner Brothers Circuit Management Corp., 216 F.2d 920, 924 (2d Cir. 1954).

POINT III

THE BALANCE OF INTERESTS REQUIRES REVERSAL OF THE DISQUALIFICATION ORDER

In Point II of our principal brief we discussed the various interests that are at stake in this case. Chief among these was Hull's right to freedom of association and to be represented by counsel of her choice. We showed that on balance no other interest was of sufficient moment to justify depriving Hull of these rights.

The relevance of that analysis was not, of course, that it provided an independent theory by which the disqualification order could be either attacked or supported. Rather, a careful balancing of the interests is relevant to a determination of the questions addressed in Point I of our principal brief and of this brief, i.e., whether the broad undefined mandate of Canon 9 should be interpreted to require disqualification in the circumstances of this case. Cf., Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 564-565 (2d Cir. 1973). More particularly, the balance suggested in our principal brief supports the presumption that Delulio did not disclose confidential information to the Rabinowitz firm, especially

where the presumption is supported by denials by all concerned that disclosure did not take place. Further, analysis of the competing interests requires rejection of defendants' novel theory (Def. Br. at 21-29) that the Rabinowitz firm should be disqualified from representing Hull because it "abetted" Delulio's alleged "disloyalty" to Celanese.

It is with the above background in mind that we discuss defendants' response to our analysis of the interests involved in this case. Defendants argue that Hull's constitutional rights are not absolute, but rather must be balanced against competing interests. They thus ignore the fact that our discussion of Hull's constitutional rights (Br. at 29-32) recognizes this precise point. Unlike defendants, however, we have analyzed the competing interests and have shown that, in the context of this case, no other interests can carry the heavy burden required to override Hull's First Amendment rights. See, N.A.A.C.P. v. Alabama, 377 U.S. 288, 307; Shelton v. Tucker, 364 U.S. 479, 488.

Indeed, it is defendants who posit an absolutist rule on this issue. They argue that in any case in which there is an arguable conflict between the provision of the

Code of Professional Responsibility and a litigant's constitutional rights to association and counsel, the latter must yield (Def. Br. at 60). Defendants ignore the clear line of cases holding that the constitutional rights involved must take precedence unless the interest furthered by the Code are of overriding and substantial importance and cannot be furthered by a less restrictive means. See, N.A.A.C.P. v. Button, 317 U.S. 415; Brotherhood of Railway Trainmen v. Virginia State Bar, 377 U.S. 1, 7; United Mine Workers of America v. Illinois State Bar Assn., 389 U.S. 217; United Transportation Union v. State Bar of Michigan, 401 U.S. 576; Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966), cert. den. 385 U.S. 987.

In the present case, moreover, the question does not involve a clear conflict between a provision of the Code and Hu[illegible]s constitutional rights. The conflict is created only by the district court's unprecedented interpretation and application of Canon 9. But neither defendants nor the district court have been able to point to any significant real interests which require the result reached by the district court. Thus, there has been no actual disclosure of confidences by Delulio to the Rabinowitz firm. Moreover, privileged information would be of little or no

relevance in the litigation of Hull's complaint (Br. at 36-38). Finally, prior to any contact with Delulio, plaintiff had requested and was entitled to discover the very information about which defendants assert Delulio had knowledge (Br. at 38, n. 18).[16/]

Thus, the balance of interests in the context of the present case mandates rejection of the theories proposed by the defendants in support of the district court's erroneous order.

16/ Defendants argue, citing Doe v. A. Corp., 330 F.Supp. 1352 (S.D.N.Y. 1971), aff'd 453 F.2d 1375 (2d Cir. 1972), and Fleischer v. A.A.P., Inc., 163 F.Supp. 548 (S.D.N.Y. 1958), app. dismissed 264 F.2d 515 (2d Cir. 1959), that "it does not matter whether information obtained in confidence from a client is available through other sources" (Def. Br. at 59). But the rule of the Doe and Fleischer cases applies only to the classic conflict-of-interest situation, where a lawyer has represented both sides in the case on related matters or there has been an actual disclosure. In that situation we have seen that there is a rule of automatic disqualification; the law has determined that the balance of equities requires disqualification regardless of other factors, including the availability of the information through independent channels. Here we have seen that the question is different. It is whether the balance of equities requires automatic disqualification in the face of evidence that there has been no actual disclosure. Defendants attempt to foreclose consideration of the equities by conclusorily applying a rule from a different context which was adopted only after full consideration of the interests involved in that context.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED

Dated: New York, New York
January 22, 1975

Respectfully submitted,

RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, New York 10017
(212 (Xford 7-8640

Attorneys for Appellant

LEONARD B. BOUDIN
K. RANDLETT WALSTER
ERIC M. LIEBERMAN

Of Counsel